

STATE OF NORTH CAROLINA  
COUNTY OF CHATHAM

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
17 EHR 2222

ARAUCO PANELS USA, LLC,	)	
Petitioner,	)	
	)	
v.	)	<b>SETTLEMENT AGREEMENT</b>
	)	<b>AND WITHDRAWAL OF</b>
NORTH CAROLINA DEPARTMENT	)	<b>PETITION</b>
OF ENVIRONMENTAL QUALITY,	)	
DIVISION OF WATER RESOURCES,	)	
Respondent.	)	
	)	

Arauco Panels USA, LLC, Petitioner ("Arauco" or "Petitioner"), and the North Carolina Department of Environmental Quality, Division of Water Resources ("DWR"), Respondent, hereby enter into this Settlement Agreement ("Agreement") in order to resolve a matter in controversy between them pursuant to N.C. Gen. Stat. § 150B-31(b). This matter arose out of the assessment of a civil penalty and enforcement costs in the amount of \$35,238.25 (DWR Case No. PC-2016-0056) by Respondent against Petitioner. The civil penalty was assessed on February 27, 2017, for violations of N.C.G.S. § 143-215.1 and various conditions of its Permit No. WQ0003396 at the Arauco facility in Chatham County ("Facility"), as more fully described in the Civil Penalty Assessment, the Document Constituting Agency Action in this contested case. A site map of the Facility is attached hereto as Exhibit A.

Without any hearing of fact or law in the above-styled matter, IT IS THEREFORE AGREED BY THE PARTIES THAT:

1. In order to avoid the cost and delay of further litigation, the parties have entered into this Agreement and have agreed that all parties have been correctly designated and that there is no question as to misjoinder or nonjoinder.
2. Petitioner shall pay Respondent \$35,238.25, which includes \$35,000.00 for the civil penalties and two hundred thirty-eight dollars and twenty-five cents (\$238.25) for investigative costs, in full settlement of the civil penalty assessment of February 27, 2017. The Settlement Amount shall be made in a lump sum payment due within thirty (30) calendar days of the filing of this Agreement. The payment shall be made by check and made payable to the "North Carolina Department of Environmental Quality" (or to "NC DEQ"), and delivered to the following address:

Non-Discharge Permitting Unit  
Division of Water Resources  
Attention: Sonia Gregory  
1617 Mail Service Center  
Raleigh NC 27699-1617

3. At all times when the freeboard elevation in the lagoon structure labeled as "Pond 5C" and "Pond 5D" in Exhibit A (which may collectively be referred to below as "Pond 5")<sup>1</sup> is higher than the permitted level (in either Permit No. WQ0003396 or any later-applicable permit such as an NPDES permit), Arauco shall:
- a. Perform daily inspections of the entire lagoon<sup>2</sup> structure of Pond 5. Arauco shall document the following information five days a week:
    - i. freeboard elevation (i.e., document the numeric freeboard elevation),
    - ii. the location of any wetted areas on the lagoon berm or on the toe of lagoon berm, documented with both a narrative description and photographs,
    - iii. the location and description of any cracks, sloughing, rills, or gullies, documented with both a narrative description and photographs.

This documentation must be emailed on a daily basis to DWR Raleigh Regional Office supervisors (e.g., Danny.Smith@ncdenr.gov and Rick.Bolich@ncdenr.gov). Notify the DWR Raleigh Regional Office of any structural change, wastewater overflow, seep, or unpermitted discharge within 24 hours of the observation at the following:

Danny Smith, Rick Bolich, or, if both are unavailable at the time, other  
DWR Raleigh Regional Office staff  
(919) 791-4200 during normal business hours or  
1-800-858-0368 outside of normal business hours

Arauco shall, within 5 calendar days of said observation, provide to DWR Raleigh Regional Office a written report detailing what happened with supporting photographs and data, and detailing corrective measures. Said notification shall be provided to the DWR Raleigh Regional Office supervisors (e.g., Danny.Smith@ncdenr.gov and Rick.Bolich@ncdenr.gov); and to the following address:

Water Quality Regional Operations Section  
Raleigh Regional Office  
Attention: Danny Smith  
3800 Barrett Drive  
Raleigh NC 27609

4. Arauco shall within five (5) business days after the execution of this Agreement confirm to DWR in the manner set forth below that the following actions have been completed:

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<sup>1</sup> The lagoon structure labeled as "Pond 5" includes "Pond 5D" as shown in Exhibit A.

<sup>2</sup> The terms "pond" and "lagoon" may be used interchangeably in this Agreement.

- a. Reduce the wastewater level in Pond 5D and Pond 5C to the previously permitted level of 1 foot below the top of the original lagoon berm elevation (i.e., the berm elevation before unauthorized earthen fill was placed upon the berm) as required by WQ0003396. Notify DWR Raleigh Regional Office supervisors (e.g., [Danny.Smith@ncdenr.gov](mailto:Danny.Smith@ncdenr.gov) and [Rick.Bolich@ncdenr.gov](mailto:Rick.Bolich@ncdenr.gov)) as soon as this is accomplished. From that date forward, the wastewater level in Pond 5 shall not exceed 1 foot below the previous berm height.
- b. Construct a lagoon freeboard level measurement gauge that has been surveyed along with the elevation of the top of the lagoon berm so that the gauge measures freeboard with respect to the lowest elevation of the top of the berm to within 0.1'.
  - i. Provide written notification to DWR Raleigh Regional Office that the gauge has been constructed as described above by email to DWR Raleigh Regional Office supervisors (e.g., [Danny.Smith@ncdenr.gov](mailto:Danny.Smith@ncdenr.gov) and [Rick.Bolich@ncdenr.gov](mailto:Rick.Bolich@ncdenr.gov));

and to the following address:

Water Quality Regional Operations Section  
Raleigh Regional Office  
Attention: Danny Smith  
3800 Barrett Drive  
Raleigh NC 27609

- c. Determine whether or not the stormwater diversion, currently diverting stormwater away from Pond 5C is stable (i.e., not eroding or at risk of eroding). If the stormwater diversion has not been stabilized, immediately stabilize the area. Provide documentation sealed by a North Carolina-licensed professional engineer to the DWR Raleigh Regional Office demonstrating that either 1) the stormwater diversion is already stable, or 2) the stormwater diversion was not stable but has been stabilized. Provide said documentation by email to the DWR Raleigh Regional Office supervisors (e.g., [Danny.Smith@ncdenr.gov](mailto:Danny.Smith@ncdenr.gov) and [Rick.Bolich@ncdenr.gov](mailto:Rick.Bolich@ncdenr.gov));

and to the following address:

Water Quality Regional Operations Section  
Raleigh Regional Office  
Attention: Danny Smith  
3800 Barrett Drive  
Raleigh NC 27609

- d. Have a geotechnical analysis of the structural integrity of all the existing wastewater lagoons, including those labeled as Pond 5C, Pond 5D, Pond 1, Pond 2, Pond 3, and Pond 4 ("upper ponds") in Exhibit A, performed by a North Carolina-licensed professional engineer. At a minimum, this geotechnical analysis must address and include an analysis of the effect of the following:

- i. the stability of the toe of the berm of Pond 5, including but not limited to:
  - 1. the area adjacent to the stormwater diversion on 5C;
  - 2. the excavation of borrow pits adjacent to Pond 5D and Pond 5C, including whether this activity has compromised the integrity of the entire berm structure, including the previously-existing berm structure (prior to the addition of new material) ("previous berm"),
- ii. earthen fill placed on top of the berm,
- iii. stormwater redirection efforts (excavation along edge/toe of the lagoon),
- iv. the internal berm (separating upper and lower sections of the lagoon and any operational/freeboard concerns),
- v. stormwater/overland stormwater flow into the lagoon,
- vi. recommended corrective action if the structural stability of the lagoon cannot be confirmed, including an immediate plan to ensure freeboard levels are lowered to and maintained to the level specified in permit WQ0003396.

The geotechnical analysis must be submitted in writing by email to the DWR Raleigh Regional Office supervisors (e.g., [Danny.Smith@ncdenr.gov](mailto:Danny.Smith@ncdenr.gov) and [Rick.Bolich@ncdenr.gov](mailto:Rick.Bolich@ncdenr.gov));

and to the following address:

DWR Raleigh Regional Office  
Attn: Danny Smith  
3800 Barrett Drive  
Raleigh NC 27609

As soon as possible, but no later than ten (10) days after notification by DWR that any additional information is needed, Arauco shall provide any such information. Furthermore, Arauco shall also submit the geotechnical analysis as additional information in the context of its NPDES permit application.

- 5. If the structural integrity of any of the lagoons is approved by DWR, Arauco shall comply with any conditions to DWR's approval of the structural integrity of said lagoons.
- 6. If the structural integrity of any of the lagoons is **not** approved by DWR:
  - a. Arauco shall:
    - i. By December 31, 2017, repair the lagoon(s) such that structural integrity can be certified by a NC licensed engineer, and

- ii. Once any lagoon requiring repair has been repaired, maintain at least 1' of freeboard in the repaired lagoon(s), or submit a permit modification application for modification of any applicable permits to reflect the changes to the freeboard measurements.
  - b. Or
  - c. Arauco shall, by December 31, 2017, close the lagoon(s) in compliance with the lagoon closure guidelines attached hereto as Exhibit B.
7. In the event Arauco fails to comply with any of the conditions of this Agreement or any of the DWR approvals obtained hereunder, Arauco shall immediately owe DWR the entire amount of the original civil penalty assessment, i.e., \$35,238.25, less any payments already made. Arauco authorizes DWR to file a Confessed Judgment for that amount in superior court. In addition:
- a. Arauco shall pay a stipulated penalty of \$5,000 if the freeboard in Pond 5 (as set forth in either Permit No. WQ0003396 or any later-applicable permit such as an NPDES permit) is less than 1.0 foot for any consecutive five-day period. If the Pond 5 freeboard is less than 1.0 foot for more than a consecutive five-day period but less than a consecutive ten-day period, Arauco shall pay a stipulated penalty of \$20,000 for that period. If the Pond 5 freeboard is less than 1.0 foot for 10 or more consecutive days, Arauco shall pay a stipulated penalty of \$20,000 for the first 10 days and a daily stipulated penalty of \$20,000 dollars per day for each day thereafter, continuing on a daily basis until compliance is achieved.
  - b. If Arauco fails to comply with any other conditions of this Agreement, Arauco shall pay a stipulated penalty of \$1,000.00 per day for the period from the first day of noncompliance and continuing on a daily basis until compliance is achieved.
  - c. The sums due for said daily penalties shall be due and payable on a weekly basis by check made payable to the "North Carolina Department of Environmental Quality" or "NC DEQ" and delivered to the following address:

Non-Discharge Permitting Unit  
Division of Water Resources  
Attention: Sonia Gregory  
1617 Mail Service Center  
Raleigh NC 27699-1617
8. Arauco's obligation to comply with the requirements set forth in this Agreement may be delayed or excused only to the extent that noncompliance is caused by circumstances beyond the control of Arauco, as determined by the DWR Director or his/her designee. Contractor delays or failure to obtain funding will not be considered events beyond Arauco's control. If any such delaying event occurs, Arauco shall notify the DWR Raleigh Regional Office in writing within ten (10) days of encountering or discovering the delaying event, describing in detail the event or delay, the precise cause(s) of the event or delay, the measure(s) taken and

to be taken by Arauco to prevent or minimize the event or delay, and the schedule by which those measures will be implemented. If the DWR Director or his/her designee determines that noncompliance with this Agreement was caused by circumstances beyond the control of Arauco, Respondent and Arauco may jointly stipulate and agree to a written modification of this Agreement. Extension of any compliance date pursuant to this Paragraph shall not extend any subsequent deadlines established in this Agreement unless the subsequent deadline is necessarily dependent upon completion of the earlier deadline.

9. Petitioner expressly agrees that by entering into this Agreement, Petitioner waives, for purposes of collection of any sums due hereunder, any and all defenses to the underlying civil penalty assessment, and that the issues in any action to collect said penalty will be limited to Petitioner's compliance with the terms of this Agreement.
10. If Arauco fully and completely complies with all the terms of this Agreement prior to its expiration, DWR agrees not assess further penalties pursuant to N.C.G.S. § 143-215.6A for the violations addressed in the July 15, 2016 NOV and the May 5, 2017 NOV and agrees that this Agreement resolves all matters relating to the terms of Permit No. WQ0003396 up through and including the date of the signing of this Agreement. Nothing in this Agreement relieves Arauco of its duty to abide by the terms of Permit No. WQ0003396, or any other applicable permits, certifications, or other authorizations. Nothing in this Agreement shall restrict the right of Respondent to inspect or take enforcement action against Petitioner for any violations of the water quality statutes, the relevant rules promulgated thereunder, or any water quality permits held by Petitioner, including but not limited to Permit No. WQ0003396. Such enforcement action may include requesting a court of competent jurisdiction for injunctive relief, regardless of Arauco's compliance with the terms of this Agreement. Similarly, nothing in this Agreement shall restrict the right of Petitioner to contest a new or subsequent enforcement action.
11. The parties agree that the consideration for this Agreement is the promises contained herein and that this Agreement contains the whole agreement between them.
12. This Agreement shall be binding upon the parties, their successors and assigns, upon execution by the undersigned, who represent and warrant that they are authorized to enter into this agreement on behalf of the parties hereto. This Agreement is entered into knowingly, intelligently, and voluntarily.
13. DEQ and Petitioner agree that, for purposes of any future bankruptcy proceeding, this Agreement is not intended as, nor shall it be deemed to constitute, a novation of any claims asserted by the Respondent against Petitioner. Petitioner further agrees that all sums payable to the DEQ pursuant to this Agreement are nondischargeable in bankruptcy under 11 U.S.C. § 523. Nothing in this Agreement releases any nondischargeability claims that may be asserted by DEQ in any bankruptcy proceeding, and nothing in this Agreement shall be deemed a waiver of DEQ's right to rely on the nature of any claim or debt released in this Agreement to show that the claim or debt is nondischargeable.
14. Should any provision of this Agreement be declared by a court of competent jurisdiction to be inconsistent with Federal or State law and therefore unenforceable, the remaining

provisions hereof shall remain in full force and effect.

15. Any modification of this Agreement must be agreed to in writing signed by both parties.

16. This Agreement shall expire upon the earliest of the following:

- a. one year after the date of execution by both parties,
- b. upon DWR's rescission of Permit No. WQ0003396 or any later-applicable NPDES permit, or
- c. upon DWR's approval of the transfer to another permittee of Permit No. WQ0003396 or any later-applicable NPDES permit.

#### WITHDRAWAL OF PETITION

Entry of this Agreement serves as Petitioner's Voluntary Withdrawal with Prejudice of its Petition for Contested Case Hearing in these matters. The parties agree this matter is concluded and that no further proceedings are needed or required to resolve the contested case.

ARAUCO PANELS USA, LLC

By:

Henry R. Smith  
[name of person signing for Arauco]

Date:

11-6-2017

[ADDITIONAL SIGNATURE ON FOLLOWING PAGE]

NORTH CAROLINA DEPARTMENT  
OF ENVIRONMENTAL QUALITY  
DIVISION OF WATER RESOURCES

By: 

Jeff Poupart  
Section Chief  
Water Quality Permitting Section  
Division of Water Resources

Date: 11/3/17